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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER DEEDY,

Petitioner-Appellee,

v.

RUSSELL A. SUZUKI et al.,

Respondents-Appellants.

No. 18-16632

D.C. No.

1:18-cv-00094-DKW-RLP

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Derrick Kahala Watson, District Judge, Presiding

Argued and Submitted October 21, 2019
Honolulu, Hawaii

Before: GRABER, M. SMITH, and WATFORD, Circuit Judges.

Petitioner Christopher Deedy filed a 28 U.S.C. § 2241 habeas petition, seeking, on double jeopardy grounds, to prevent the State of Hawaii from retrying him on charges of manslaughter, first-degree assault, and second-degree assault. The district court granted his petition, holding that the trial court had acquitted Petitioner of all three charges at his first trial. The State timely appeals.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Reviewing de novo, Wilson v. Belleque, 554 F.3d 816, 828 (9th Cir. 2009), we affirm in part and reverse in part.

1. The Rooker-Feldman doctrine did not bar the district court from exercising jurisdiction over the § 2241 petition. We rejected this jurisdictional argument in Gouveia v. Espinda, 926 F.3d 1102, 1107–10 (9th Cir. 2019).

2. Petitioner did not forfeit his double jeopardy claim as to manslaughter. Before his second trial for second-degree murder began, Petitioner moved for the trial court not to instruct the jury on manslaughter, arguing that doing so would put him in double jeopardy for that offense. And Petitioner renewed that argument at the charge conference.

3. The Double Jeopardy Clause forbids the State from retrying Petitioner for manslaughter because he was acquitted of manslaughter at his first trial. An acquittal encompasses "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." Evans v. Michigan, 568 U.S. 313, 318 (2013). At the first trial, the trial court explicitly stated that there was no evidence in the record to support instructing the jury on manslaughter, and the court did not instruct the jury on manslaughter.

Although federal law determines whether a prosecution violates the Double Jeopardy Clause, the Supreme Court has looked to state law to determine whether a

state court's decision constituted an acquittal. Id. at 320. Hawaii law requires trial courts to instruct juries on any lesser-included offense that has "a rational basis in the evidence," regardless of whether "the prosecution requests, or the defense objects to, such an instruction." State v. Adviento, 319 P.3d 1131, 1148 (Haw. 2014) (quoting State v. Haanio, 16 P.3d 246, 248 (Haw. 2001)). Under Hawaii law, manslaughter is a lesser-included offense of second-degree murder. Thus, by explicitly stating that there was no evidence to support a manslaughter instruction, and by refusing to instruct the jury on manslaughter, the trial court determined that the State's proof was insufficient to establish Petitioner's criminal liability for that offense. It does not matter that the trial court did not label the ruling an "acquittal" or that the ruling might have been (according to the State) wrong. See Evans, 568 U.S. at 318, 325 (stating that an acquittal precludes retrial "even if the acquittal is based upon an egregiously erroneous foundation" (internal quotation marks omitted)).

4. Assuming, without deciding, that Petitioner did not forfeit his double jeopardy claims as to the two assault charges, the Double Jeopardy Clause does not forbid the State from retrying him. At first glance, the trial court's decision not to instruct the jury on assault at the first trial appears to represent, under the Adviento rule, an implicit determination that the State's proof was insufficient to convict

Petitioner of either assault charge. But, during the charge conference at the second trial, the trial court explained that it was legally unclear at the time of the first trial whether assault was a lesser-included offense of second-degree murder under Hawaii law. The Hawaii Supreme Court answered that question affirmatively well after the first trial ended. State v. Kaeo, 323 P.3d 95, 96 (Haw. 2014).

Thus, we know that "the substance of [the] court's decision" was not a determination that the State failed to introduce sufficient evidence to convict Petitioner of the assault charges. Evans, 568 U.S. at 322. Accordingly, because there was a hung jury on the assault charges at the second trial, the State may retry Petitioner again for first- and second-degree assault.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

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- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

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FOR THE NINTH CIRCUIT
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